

# Mandatory recognition of multiple-vote shares for companies listed on a multilateral trading facility

Directive (EU) 2024/2810 of the European Parliament and of the Council of 23 October 2024 on multiple-vote share structures in companies that seek admission to trading of their shares on a multilateral trading facility will have to be transposed into Spanish law within two years of its entry into force.

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### 1. Introduction

In more than half of the Member States of the European Union it is possible to issue shares that do not respect the proportionality between nominal value and voting rights. Among the most recent States that have amended their laws to recognise - to a greater or lesser extent - multiple-voting shares are Germany (ZuFinG of 15 December 2023), Italy (Act 21/2024 of 5 March) and France (Act 2024-537 of 13 June). In Spain, it is not possible to issue shares that do not respect proportionality between the

nominal value and voting rights (Arts. 96(2) and 188(2) Companies Act [LSC]), apart from the loyalty (double voting) shares provided for listed companies (Act 5/2021 of 12 April), which have not been particularly successful as they have only been recognised in the articles of association of four companies listed on the Spanish 'Continuous Market'. Broadly speaking, the 'one share, one vote' rule applies, apart, of course, from the possibility of a limitation in the articles of association on the maximum number of votes that can be cast by a single shareholder (Art. 188.3 LSC). However, it is possible to

create a class of shares (or several classes) carrying as many voting rights as their nominal value proportionally exceeds that of the shares carrying a single voting right, as illustrated by some recent cases on the Spanish Stock Exchange (for example, class A shares with a nominal value of five euros carry five votes compared to class B shares with a nominal value of one euro that carry one vote). This does not violate the aforementioned Articles 96 and 188 LSC.

Loyalty shares are expressly excluded from Directive (EU) 2024/2810 of the European Parliament and of the Council of 23 October on multiple-vote share structures in companies that seek admission to trading of their shares on a multilateral trading facility (the 'Directive'), published in the *Official Journal of the European Union* on 14 November.

## *The Directive is one of legislative minimums*

The incorporation of this piece of legislation into Spanish law within two years of its entry into force - on 5 December - will mean the recognition of 'multiple-vote shares' at the same nominal value, i.e. the repeal of the prohibition contained in Article 96(2) LSC: "Shares which directly or indirectly alter the proportionality between nominal value and voting or priority rights may not be issued".

The scope to be given to the recognition of these multiple-vote share structures (in the words of the European legislator) is a matter of legislative policy that will have to be resolved in a future amendment to the Companies Act: either to admit multiple-vote

shares only with regards to companies that seek admission to trading of their shares on a multilateral trading facility - which is the scope of application of the Directive - or to extend this possibility to companies listed on the regulated market, or even to all Spanish public limited companies.

### **2. Purpose and scope of application of the Directive**

The Directive aims to support SMEs' access to funding through the securities markets, specifically multilateral trading facilities (MTFs), a category distinct from the regulated markets, which in Spain, for shares, are the Stock Exchanges. If the aim is to 'reinforce the attractiveness of listing', it is necessary to remove 'regulatory barriers' that hinder SMEs' access to these multilateral trading facilities. Recital 2 of the Directive states that "[f]ear of losing control of the company constitutes an important deterrent for controlling shareholders to access a public market, such as an MTF. Admission to trading usually entails dilution of ownership for controlling shareholders, thus reducing their influence over important investment and operating decisions". The aim is therefore to enable "controlling shareholders to retain control of the company after accessing MTFs, which include SME growth markets", while safeguarding the rights of minority shareholders.

The possibility of retaining control can be legally recognised through what the Directive calls the multiple-vote share (MVS) structure, a structure containing at least two classes of shares, each with a different number of votes per share, and excluding those where the differences in voting rights are determined solely by the different nominal

values of the shares, as in the example given at the beginning of this paper. Also excluded from the scope of the Directive are structures comprising non-voting shares or shares with a veto right.

Article 1 proclaims the subject matter and scope of the Directive: laying down “common rules on multiple-vote share (MVS) structures in companies that seek admission to trading of their shares on multilateral trading facilities (MTFs), which include SME growth markets, and that do not have any shares that are already admitted to trading on an MTF or a regulated market”. In other words, Member States are required to recognise multiple-vote shares in applications for admission to trading on a multilateral trading facility, which does not necessarily have to be an SME growth market, so that it is up to the public limited company - not necessarily an SME - to establish multiple-vote rights in its articles of association in accordance with the requirements set out in the Directive. We state that it is not necessary for the company seeking admission of its shares on a multilateral trading facility to be an SME, even when such facility is an SME growth market as envisaged by MiFID II. Indeed, these SME growth markets require, in order to maintain their status as such, that at least 50% of the companies listed on them are SMEs, whereby the rest can be larger public limited companies that will also benefit from the possibility of recognition of multiple-vote share structures. It remains to be seen whether this change will attract not only SMEs but also large companies to Spanish multilateral trading facilities. Although the Directive’s scope does not refer to public limited companies with multiple-vote share structures whose securities are already listed on multilateral trading facilities (currently not possible in this kind of Spanish market), the Direc-

tive also lays down for them disclosure requirements in Article 5, to which we refer below.

### 3. Requirements for recognition of multiple-vote shares within articles of association

Prior to admission to trading on a multilateral trading facility, the company has to provide for this type of share in its articles of association (Article 3 of the Directive refers to the taking of a decision to adopt a multiple-vote share structure at a general meeting by a qualified majority under national law). For the sake of shareholder protection, if the company has several classes of shares, the decision “shall also be subject to a separate vote in each class of shares the rights of which are affected”, a provision contained as a generally-applicable minority protection mechanism in Article 291 of our Companies Act. Although national law must provide for the possibility of multiple-vote shares in companies that seek admission to trading of their shares on a multilateral trading facility, the text allows the existence of such multiple-vote shares to be made conditional on the admission to trading in a multilateral trading facility by the operator thereof.

Member States are prohibited from making “the adoption of an MVS structure conditional upon the provision of enhanced economic rights for shares without enhanced voting rights” (Art. 3(1) *in fine*).

One of the most controversial issues in the course of the Directive’s passage was the question of the safeguards for a minority shareholder of the company that seeks admission to trading of its shares on a multilateral trading facility. Countries with legal recognition of multiple-vote shares considered

## *The Directive provides for mechanisms to protect minority shareholders*

that some of the measures proposed as mandatory in the proposal for the Directive infringed their company law and, in their opinion, did not improve access to funding through the securities markets. In this regard, the Danish Corporate Governance Committee, in a communiqué of November 2023, cited the establishment of a maximum number of votes per share or the provision, finally not included, of the mandatory exclusion from the calculation of these multiple-vote rights for the passage of certain company resolutions. In the final version of the Directive, it is left to the company's discretion to include these clauses in the articles of association.

In this way, Article 4 (“Safeguards”) offers Member States various possibilities as regards the protection of minority shareholders when amending their company law to incorporate the content of the Directive. While the general principle is the limitation of the impact of multiple-vote shares on the decision-making process at the general meeting, this impact limitation requires at least the introduction of one of the following measures: either a “maximum ratio of the number of votes attached to MVSs to the number of votes attached to shares with the lowest voting rights”, or that the qualified majority specified by national law for the taking of decisions consists:

a) “both of the votes cast and either of the share capital represented at the general meeting or of the number of shares represented at the general meeting” (in Danish law, for example, 90 % of the votes and 90 % of the capital held by shareholders present or represented at the meeting); or

b) “of the votes cast, and subject to a separate vote in each class of shares the rights of which are affected”.

Essential in this matter (establishment of qualified majorities for the passage of company resolutions) is the exclusion of decisions regarding the appointment and removal of directors (the Directive refers to “members of the administrative, management and supervisory bodies of the company”), as well as those regarding “operational decisions to be taken by such bodies and that are submitted to the general meeting for approval”. The Directive does not clarify what is meant by *operational decisions* submitted for approval by the general meeting; we will have to wait for the transposition of the Directive in order to know the scope of this exclusion of multiple votes from the tally in resolutions linked to the retention of control of the company by the majority shareholder or group.

In any case, as a minimum harmonisation rule, the recognition of multiple-vote shares in articles of association requires the qualified majorities provided for in national law and that the resolution be subject to a separate vote in each class of shares the rights of which are affected.

On the other hand, Member States are recognised as having the power to include in their national law “further safeguards to ensure adequate protection of the interests of shareholders who do not hold MVSs”, such as provisions to prevent the enhanced voting rights attached to MVSs from continuing to exist after their transfer to third parties or upon the death, incapacitation

or retirement of the original holder of those MVSs (transfer-based sunset clause), after a designated period of time (time-based sunset clause), or after the occurrence of a specified event (event-based sunset clause) not detailed in the Directive and which, it is understood, will have to be specified by the company itself.

#### 4. Disclosure requirements

In order to ensure that investors have sufficient information to make informed decisions, Article 5 of the Directive, entitled ‘Transparency’, requires companies that seek admission to trading of their shares on a multilateral trading facility (and also those whose share are already listed on such facilities, which is not the case in Spain) to provide information, either in the prospectus or in the admission document, on the following aspects:

- a) the share structure of the company, an indication of the different classes of shares, including shares which are not admitted to trading;
- b) any restrictions on the transfer of shares or on voting rights of shares, including in both cases “agreements between shareholders which are known to the company and that could result in such restrictions”;
- c) the identity, if known to the company, of shareholders holding MVSs representing more than 5 % of the voting rights of all shares in the company, and of natural persons or legal entities entitled to exercise voting rights on behalf of those shareholders, where applicable.

With regard to restrictions on voting rights, recital 17 (not an article) of the Directive

clarifies that limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby the financial rights attached to shares are separated from the holding of shares should also be disclosed, in an almost verbatim transcription of Article 29-H, letter f, of the Portuguese Securities Code, a provision dedicated to the content of the annual corporate governance report of a company listed on the Portuguese regulated market.

Changes to this information must be reflected in the annual financial report, although they have probably been made public beforehand, either as inside information or as other relevant information in compliance with market abuse legislation.

Moreover, the European Securities and Markets Authority is mandated to develop, within twelve months of the entry into force of the Directive, draft regulatory technical standards specifying how investment firms and market operators shall identify shares of companies with MVS structures, as well as how those companies shall inform the investment firms and market operators about the existence of those MVS structures.

#### 5. Review

Unlike the other amendments of an eminently financial nature also included in the Listing Act (prospectus, market abuse and MiFID II regimes), this Directive was approved in the Parliament with only 50% of the votes cast in favour, 118 votes against and 114 abstentions. Article 6 therefore requires the European Commission to submit a report to the European Parliament and the Council on the implementation and effectiveness of this Directive, as well as

on the appropriateness of extending its scope (i.e. to regulated markets) within a maximum period of four years from the entry into force of the Directive. The Directive is a step forward in the harmonisation of company law in the European Union, at least for

***The company's articles of association shall provide for shares with multiple-vote rights***

companies listed on multilateral trading facilities, but there are still many differences between jurisdictions on the issue of multiple-vote shares.